

STATE OF MICHIGAN
IN THE SUPREME COURT

HEATHER LYNN HANNAY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant.

Supreme Court No. 146763

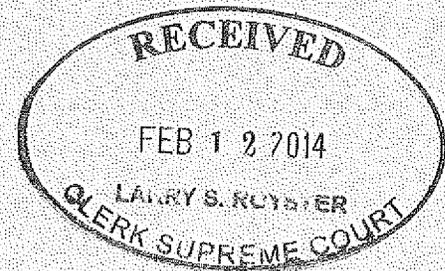
Court of Appeals No. 307616

Court of Claims No. 09-116 MZ(A)

**BRIEF OF AMICUS CURIAE MICHIGAN MUNICIPAL RISK
MANAGEMENT AUTHORITY**

CERTIFICATE OF SERVICE

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STATEMENT OF ISSUE PRESENTED

IS THE COURT OF APPEALS' DECISION ALLOWING RECOVERY FOR DAMAGES OTHER THAN "BODILY INJURY" AND "PROPERTY DAMAGE" CONTRARY TO THE ESTABLISHED LAW OF THIS STATE MANDATING A NARROW CONSTRUCTION OF THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY?

The Court of Appeals said "No."

Plaintiff-Appellee Hannay answers: "No."

Defendant-Appellant MDOT answers: "Yes."

Amicus curiae MMRMA answers: "Yes."

STATEMENT OF INTEREST

The Michigan Municipal Risk Management Authority (MMRMA) is a public entity self-insurance pool, created in 1980 under MCL 124.1 *et seq.*, that provides liability and property coverage to its membership of more than 300 Michigan local governmental units. Thirty years after its inception, the MMRMA is the largest liability and property pool in Michigan. Members include over 200 cities, counties, townships, and special districts combined, as well as dozens of other governmental entities, including libraries, medical care facilities, fire departments, 911/dispatch departments, courts, transportation departments, and cable services. The MMRMA appears before this Court as a representative of its members throughout Michigan, all of whom could potentially be affected by the issues involved in this case.

At issue in this case is whether economic loss in the form of wage loss may qualify as a “bodily injury” that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception. The MMRMA is particularly concerned with the far-reaching consequences of a deviation from this Court’s settled, narrow interpretation of the motor vehicle exception to the broad immunity granted to governmental entities. If the Court of Appeals’ broad interpretation of the exception in this case is allowed to stand, it will economically affect municipal governmental entities throughout the state of

Michigan, which in turn will impact the MMRMA as the public entity self-insurance pool that provides liability and property coverage to these entities.

Applying the No-Fault Act as it did in this case, the Court of Appeals essentially nullified the damage limitations contained in the government tort liability act. Such a nullification of the damage limitations will have a significant impact on municipal liability, and thus will have a significant impact on the MMRMA.

INTRODUCTION

This case presents this Court with an opportunity to follow its consistent approach of honoring the plain language and narrow construction of the exceptions to governmental immunity. Here, the Court is being asked to decide whether economic damages in the form of work loss qualifies as a “bodily injury” under the motor vehicle exception to governmental immunity, MCL 691.1405. Applying and narrowly construing the plain language of this exception, the phrase “bodily injury” does not encompass damages for work loss or any other non-bodily injury and, thus, does not permit a plaintiff to avoid the otherwise broad immunity afforded a governmental entity.

Plaintiff asserts that the No-Fault Act abrogates the GTLA by allowing certain damages, such as excess work loss. However, there is nothing in the No-Fault Act that expressly revokes the immunity granted to governmental entities. The No-Fault Act was created to reduce the liability of all defendants, not expand the government’s liability under the GTLA.

The Court of Appeals erred in its conclusion that Plaintiff was entitled to damages from MDOT outside of those for “bodily injury” and “property damage.” The Court of Appeals failed to apply this Court’s clear analysis in *Wesche v Mecosta County Road Comm’n*, 480 Mich 75; 746 NW2d 847 (2008), that the phrase “bodily injury” means “of or pertaining to the body” or “corporeal or

material, as contrasted with spiritual or mental.” *Id.* at 84-85 (quoting Random House Webster’s College Dictionary (2000)). Even more remarkably, the Court of Appeals failed to apply the primary rationale for the holding in *Wesche*: that the statutory language of the exceptions to governmental immunity must be narrowly construed. Under a narrow construction of “bodily injury,” damages are only available for physical or corporeal injuries to the body. As such, damages for all other non-bodily injuries are excluded under MCL 691.1405. This includes not only work loss damages, but also any other claim for damages that does not involve a direct physical injury to the body, such as mental, emotional or psychological injuries. Amicus curiae urges this Court to continue its narrow interpretation of the statutory exceptions to governmental immunity by holding that a plaintiff may not recover damages for anything other than for “bodily injury.”

LAW AND ARGUMENT

THE COURT OF APPEALS’ DECISION ALLOWING THE RECOVERY OF DAMAGES OTHER THAN “BODILY INJURY” AND “PROPERTY DAMAGE” IS CONTRARY TO THE ESTABLISHED LAW OF THIS STATE MANDATING A NARROW CONSTRUCTION OF THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY.

Under the Government Tort Liability Act (GTLA), a governmental entity is immune from tort liability for actions that accrue while it is engaged in the performance of a governmental function. MCL 691.1404, et seq.; *Reardon v Dep’t*

of Mental Health, 430 Mich 398, 406-07; 424 NW2d 248 (1988)(citing MCL 691.1407). This immunity is subject to only six statutory exceptions.¹ *Robinson v City of Lansing*, 486 Mich 1, 5; 782 NW2d 171 (2010). This case requires the interpretation of the motor vehicle exception, MCL 691.1405, which provides: “Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner” (Emphasis added).

A. This Court narrowly construes the exceptions to governmental immunity.

As this Court recognized in *Scheurman v Department of Transportation*, 434 Mich 619, 636, n 28; 456 NW2d 66 (1990), the statutory exceptions do not stand alone, but rather “are a part of the entire legislative scheme that defines and limits the liability of our governmental agencies.” This scheme evidences a clear legislative judgment that public and private tortfeasors should be treated differently. *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 409; 716 NW2d 236 (2006).

¹ The six statutory exceptions are (1) the highway exception, MCL 691.1402; (2) the motor-vehicle exception, MCL 691.1405; (3) the public-building exception, MCL 691.1406; (4) the proprietary-function exception, MCL 691.1413; (5) the governmental-hospital exception, MCL 691.1407(4); and (6) the sewage-disposal-system exception, MCL 691.1417.

The purpose of governmental immunity is to protect the financial resources of the state and its municipalities by precluding the expense of litigation of claims barred by governmental immunity. *Id.* at 410. In keeping with this purpose, this Court has repeatedly interpreted the language of the exceptions to immunity strictly and narrowly. See *Wesche*, 480 Mich at 158; *Grimes v Michigan Dep't of Transp*, 475 Mich 72, 89-90; 715 NW2d 275 (2006); *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002); *Stanton v Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002); *Nawrocki v Macomb Co Road Comm'n*, 463 Mich 143, 158; 615 NW2d 702 (2000); *Robinson v Detroit*, 462 Mich 439, 445-46; 613 NW2d 307 (2000); *Jackson v Detroit*, 449 Mich 420, 427; 537 NW2d 151 (1995); *Wade v Dep't of Corrections*, 439 Mich 158, 166; 483 NW2d 26 (1992); *Reardon*, 430 Mich at 410; *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984). Since the exceptions are to be narrowly construed, "there must be strict compliance with the conditions and restrictions of the statute." *Nawrocki*, 463 Mich at 158.

B. The plain language of the motor vehicle exception prohibits recovery for all damages other than those for "bodily injury" and "property damage."

The primary rule of statutory interpretation is to effect the intent of the Legislature. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). To achieve this, courts must first examine the statute's language. *Id.* If

the language is clear and unambiguous, it is assumed the Legislature intended its plain meaning, and the statute is enforced as written. *Stanton*, 466 Mich at 615.

As stated above, the exception at issue in this case is the motor vehicle exception, which provides that governmental agencies “shall be liable for bodily injury and property damage resulting from the negligent operation” of a government-owned motor vehicle. MCL 691.1405 (emphasis added). Clearly the highlighted language was intended to be a limitation on the exposure of governmental agencies. The Michigan Legislature could have enacted an exception that provided governmental agencies shall be liable for “all damages” or “injury and damage.” It did not. Instead, it enacted an exception that limits recovery to “bodily injury and property damage.” The use of these adjectives manifests an intent to narrow and restrict the meaning of the nouns “injury” and “damage.”²

Based upon this narrow construction of the statute, in *Wesche v Mecosta County*, this Court held that not all damages are recoverable under the motor vehicle exception. The precise issue in *Wesche* was whether the plaintiff was entitled to loss of consortium damages. This Court held that the motor vehicle exception only waived immunity for bodily injury and property damages. In

² Statutory interpretation requires courts to consider the placement of critical language in the stator scheme. *United States Fidelity and Guaranty Co v Michigan Catastrophic Claims Ass’n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

defining “bodily injury,” the Court stated that that term meant “‘of or pertaining to the body’ or ‘corporeal or material, as contrasted with spiritual or mental.’” *Id.* at 84. Based upon this definition, the Court held that the plaintiff could not get loss of consortium damages because they did not compensate for a physical injury to the body. *Id.* at 85.

Therefore, after *Wesche*, in deciding whether the specific damages at issue are recoverable under the motor vehicle exception, it is necessary to determine what *type* of injury for which the plaintiff is seeking damages. If the damages would compensate the plaintiff for bodily injury or property damage, they are recoverable; but if the damages are for anything else, they are not.

This Court in *Wesche* made clear that the limitation on the waiver of immunity with regard to “bodily injury” applies even if a plaintiff seeks damages for other injuries after meeting the requirement of proving a “bodily injury.” Had the Legislature intended to simply create a threshold that, once established, would permit *any and all* damages, it would have done so explicitly and, in the motor vehicle exception, it did not. *Wesche*, 480 Mich at 86. Instead, the motor vehicle exception merely provides that governmental agencies “shall be liable for bodily injury and property damage” and says nothing to suggest that any other types of damages are recoverable.

Based upon this Court's holding in *Wesche*, the Court of Appeals erred in awarding work loss damages to the plaintiff under the motor vehicle exception. The Court of Appeals held that wage loss and replacement services damages were recoverable because they "ar[is]e from the bodily injury suffered by plaintiff." Based on *Wesche*, however, this is an insufficient justification for allowing the damages to be recovered. After all, the loss of consortium damages in *Wesche* also arose from a bodily injury. It was a bodily injury that caused the interference with the normal companionship, which was the basis of the claim. As a result, the Court of Appeals' analysis oversimplified the issue and misread *Wesche*. The question it should have asked is whether the damages compensated the plaintiff for a bodily injury or for some other type of injury or damage.

The same reasoning applies to the recovery of damages for mental or emotional injuries. As stated above, the Michigan Legislature could have enacted an exception that provided governmental agencies shall be liable for "all damages" or "injury and damage." Instead, it limited the waiver of immunity to "bodily injury" and "property damage." Absent an express waiver in the GTLA, a governmental entity is only liable for a physical or corporeal injury to the body, "as contrasted with spiritual or mental." *Wesche*, 480 Mich at 84-85. Under Michigan's system of separate governmental powers, if compensation is to be

provided for mental or emotional injuries, it is the Legislature that must make the change.

C. The No-Fault Act does not abrogate governmental immunity under the GTLA.

Without acknowledging the damage limitations of “bodily injury” and “property damage” contained in Section 5 of the GTLA and awarding damages under MCL 500.3135, the Court of Appeals essentially concluded that the No-Fault Act trumps the damages limitation in the GTLA. The Court of Appeals relied on *Hardy v County of Oakland*, 461 Mich 561; 760 NW2d 811 (2008), which held that a tort claimant under the motor vehicle exception has to meet the serious impairment threshold in the No-Fault Act. Section 3135 enumerates the damages that a person injured by any motor vehicle (in contrast to a governmental entity’s motor vehicle) can receive. Subsection 3 states:

(3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:

(a) Intentionally caused harm to persons or property. Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act or omission, the person does not cause or suffer that harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person, including himself or herself, or for the purpose of averting damage to tangible property.

(b) Damages for noneconomic loss as provided and limited in subsections (1) and (2).

(c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 31102 in excess of the daily, monthly, and 3-year limitations contained in those sections. The party liable for damages is entitled to an exemption reducing his or her liability by the amount of taxes that would have been payable on account of income the injured person would have received if he or she had not been injured.

Applying the No-Fault Act as it did, the Court of Appeals essentially nullified the damage limitations contained in the GTLA. To do so is inconsistent with the holding in *Hardy*, which never purported to void the application of the immunity conferred by the motor vehicle exception:

The issue in *Hardy* was not whether the plaintiff had to show “bodily injury” to invoke the motor vehicle exception to governmental immunity stated in MCL 691.1405, but whether he also had to satisfy the serious impairment of body function threshold for tort liability under the no-fault act, MCL 500.3135. In holding that the plaintiff did, our Supreme Court did not determine that a plaintiff pursuing a tort remedy for noneconomic damages under the no-fault act need not meet the requirements of MCL 691.1405. Indeed, such a holding would have been tantamount to stating that the Legislature impliedly repealed MCL 691.1405 to the extent that it pertained to such cases. But a repeal by implication may be found only when there exists a clear conflict between two statutes that precludes their harmonious application.

Allen v Bloomfield Hills School Dist, 281 Mich App 49, 55; 760 NW2d 811 (2008)

(citations omitted).

To strip a governmental individual or agency of immunity, a statutory enactment must expressly, or by necessary inference, waive such immunity.

Ballard v Ypsilanti Township, 457 Mich 564, 574; 577 NW2d 890 (1998). The

Legislature has not made an explicit statutory declaration waiving the immunity conferred to governmental entities under the GTLA. Likewise, there is nothing in the No-Fault Act that can be read as an expansion of liability under the GTLA. To hold that the No-Fault Act deprives governmental entities of immunity would be to construe the Act as including a provision that is nowhere in the Act. This is contrary to this Court's precedent and the Legislature's intent in enacting the No-Fault Act and the GTLA.

As stated above, a repeal by implication may be found only when there exists a clear conflict between two statutes that precludes their harmonious application. *Allen, supra*. Here, there is no conflict between the two statutes. The plain language of MCL 691.1405 and MCL 500.3135 may be read harmoniously to provide that a plaintiff may avoid governmental immunity if he suffers "bodily injury" under the motor vehicle exception of MCL 691.1405, but he must also satisfy the "serious impairment" threshold as stated in MCL 500.3135. *Hardy*, 461 Mich at 564-66. Such a result is in accord with the intent of the Legislature as reflected in the plain language of the pertinent statutes. The No-Fault Act was created to reduce the liability of all defendants, not expand the government's liability under the GTLA.

CONCLUSION

Amicus curiae urges this Court to continue its narrow interpretation of the statutory exceptions to governmental immunity by holding that a plaintiff may not recover damages from a governmental entity for anything other than “bodily injury” and “property damage.” In so holding, this Court will “reflect[] the Legislature’s desire to ‘make uniform the liability of’ and ‘to define and limit’ governmental liability.” *Scheurman*, 456 Mich at 627, n 16 (citing the preamble to the governmental immunity act). Any other interpretation of the unambiguous language of the motor vehicle exception amounts to a broad construction of the phrase “bodily injury” contrary to the plain language of the exception, this Court’s consistently narrow interpretation of exceptions to governmental immunity, and the intent of the Legislature in drafting the language of the exception.

WHEREFORE, Amicus Curiae Michigan Municipal Risk Management Authority respectfully requests that this Honorable Court reverse the Court of Appeals’ holding in *Hannay v Michigan Department of Transportation*, and hold that the motor vehicle exception does not encompass claims for any damages other than for a physical, corporeal injury to the body or property damage.

Respectfully submitted,

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